No. 3033

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMMA C. LEE and H. LEE, her husband,
Plaintiffs in Error,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON, LILLIE LEVISON, MARY A. OSTROSKI, and NATIONAL SURETY COMPANY (a corporation),
Defendants in Error.

BRIEF OF ALEXANDER LEVISON AND LILLIE LEVISON, DEFENDANTS IN ERROR,

In Reply to the Brief of Plaintiffs in Error.

M. H. WASCERWITZ,
Attorney for Defendants in Error, Alexander Levison and Lillie Levison.

PERNAU PUBLISHING CO., SAN FRANCISCO

No. 3033

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMMA C. LEE and H. LEE, her husband,
Plaintiffs in Error,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON, LILLIE LEVISON, MARY A. OSTROSKI, and NATIONAL SURETY COMPANY (a corporation),
Defendants in Error.

BRIEF OF ALEXANDER LEVISON AND LILLIE LEVISON, DEFENDANTS IN ERROR,

In Reply to the Brief of Plaintiffs in Error.

Plaintiffs in error set forth as their grounds for reversal two points:

(1) They claim that "The statute of limitations is tolled under the California Code of Civil Procedure, Section 355".

(2) They claim that "The statute of limitations is tolled under the California Code of Civil Procedure, Section 352".

Defendants in error respectfully submit that neither of these points is well taken, that the

statute of limitations is not tolled and that the judgment of the District Court is absolutely correct. We will take up these points in their order.

Section 355 of the Code of Civil Procedure of the State of California, provides as follows:

> "If an action is commenced within the time prescribed therefor, and a judgment therein for plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action *within one year after the reversal.*"

Plaintiffs in error admit that this case does not fall within the literal terms of this statute, but contend that the case falls within the equity of this statute. What counsel for plaintiff means by this statement is hard to understand. He evidently means that the case does not fall within the terms of the statute passed and created by the legislature of California, but that this court should rewrite the statute and create a statute itself, so as to embrace the case at bar. Counsel cites a number of cases, one from California and the rest from foreign jurisdictions, not a single one of which applies in any respect to the case at bar. For instance, the case cited from California, Kenney v. Parks holds that the plaintiff may commence a new action of any kind having for result the same relief as was obtained in the former action *within one year after the reversal.* It is not necessary to dispute that proposition, the decision holds that the plaintiffs could have commenced an action even in a different form,

applying for the same relief, as ~~we~~ was obtained in the former action providing it is done *within one year after the reversal.* The case at bar was not reversed. Judgment went against plaintiffs in the Superior Court of California and the judgment was sustained in the Supreme Court.

Actions for false imprisonment in California are barred in one year.

C. C. P., Section 340, Subdiv. 3.

Actions for malicious prosecutions are barred in California in two years.

C. C. P., Section 339, Subdiv. 1;
Krause v. Spiegel, 94 Cal. 371;
McCusker v. Walker, 77 Cal. 212.

The alleged false imprisonment or malicious prosecution occurred on July 29th, 1909, more than eight years ago, and hence this action is barred by the statute of limitations, Section 340, Subdivision 3, and Section 399, Subdivision 1, above quoted. The statute could only be tolled if a judgment had been rendered in favor of the plaintiff and that judgment reversed by the appellate court. In that case, and in that case alone, a new action could have been commenced within one year after the reversal. And we can well see the reason for the legislature requiring before the statute can be tolled a judgment in favor of the plaintiff and reversed on appeal. Because by recovering a judgment in his favor, the plaintiff might be lulled to security considering

that he had recovered a judgment and that the judgment of the lower court was correct and relying upon that, might rest upon the judgment in his favor without taking any further action. Therefore, the legislature gave a plaintiff who recovered judgment in the trial court, which judgment was reversed on appeal, a year from the time of such reversal to commence such action. But a plaintiff against whom a judgment was rendered by the trial court could not have been lulled to such security, and therefore the legislature very properly gave to such a plaintiff no such right.

We respectfully submit that it is elementary that where the State courts have passed upon, construed and interpreted a State statute, such a construction and interpretation will be accepted by the Federal courts and is binding upon them. This statute, Section 355 of the C. C. P. of California, has been passed upon, construed and interpreted by the State courts of California, and we submit that such construction should be sustained by this court. We refer your Honors to

Fay v. Costa, 2 Cal. App. 245.

The case of Fay v. Costa is discussed by Judge Rudkin in his opinion in this case. We refer your Honors to the opinion, pages 22 and 23 of the transcript, and we respectfully submit that the opinion of Judge Rudkin is the correct statement of law in this case.

Now, as to the second point made by the plaintiffs in error. That "The statute of limitations is

tolled under the California Code of Civil Procedure, Section 352".

Counsel for the plaintiffs in error says in his brief that if he has "failed to induce the court to extend the construction of Section 355 of the C. C. P., then it logically follows that the court as well as the plaintiffs must be thrown back upon and bound to adhere to a like literal construction of Section 352".

The mistake which counsel for plaintiffs in error makes is that this case does not fall in any respect within the provisions of Section 352 of the C. C. P. of the State of California in this, that her husband is not a necessary party to this action. Counsel for plaintiffs in error has entirely overlooked the amendment to Section 370 of the C. C. P.

Section 370 of the C. C. P. as amended in 1913, Statutes of California 1913, Chapter 130, reads as follows:

> "When a married woman is a party her husband must be joined with her, except:
> Subdivision 1. When an action concerning her separate property including actions for injury to her person, libel, slander, *false imprisonment or malicious prosecution* or her right or claim to the homestead property she may sue alone."

Your Honors will thus see that for more than four years the husband has not been a necessary party to this action. The plaintiff Emma C. Lee *could have sued alone.* The husband was not, and is not, a necessary party and therefore this case

does not fall within the terms of Section 352 cited by plaintiffs in error at all. The plaintiff could have sued alone, which is a complete answer to counsel's contention. Counsel for plaintiffs in error in his briefs cites Section 370, C. C. P., as it existed prior to August 11th, 1913. Since August 11th, 1913, the actions of false imprisonment and malicious prosecution are added to the exceptions in Section 370, and since the last mentioned date, to wit: August 11th, 1913, the plaintiff could have sued alone, and it was not necessary to join her husband with her in the action.

However, even if the section had not been amended we submit that the statement by counsel for the plaintiffs in error that the cause of action "will never be barred, so long as their coverture subsists" is stretching the effect of the statute to a point beyond all reason. This statement is effectually and completely answered by the California Code of Civil Procedure, Sections 379, and 382.

Section 379 of the C. C. P. reads as follows:

> "Any person may be made a defendant * * * who is a necessary party to a complete determination or settlement of the question involved therein."

Section 382 of the C. C. P. reads as follows:

> "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; *but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defend-*

ant, the reason thereof being stated in the complaint."

And we submit that even if Section 370 had not been amended that Section 352 relied on by plaintiffs in error must be read in connection with Section 382 and plaintiff Emma C. Lee, if her husband had refused to join in the new action could easily have made him a defendant.

As Judge Rudkin so well says in his opinion:

> "It may be that the husband is a necessary party plaintiff to certain actions brought by the wife and he may refuse to join therein but even so, the wife is in no worse plight than any other plaintiff who holds a cause of action jointly with another who refuses to join. The law affords an ample remedy in such cases."
>
> Transcript pages 23 and 24, folio 21.

It is respectfully submitted to your Honors that the judgment of the District Court should be affirmed.

Dated, San Francisco,
November 30, 1917.

M. H. Wascerwitz,
Attorney for Defendants in Error, Alexander Levison and Lillie Levison.